SHOULD THE ANTI-TRUST ACT BE AMENDED?

THE Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," contains the following prohibitions:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of misdemeanor."

The cases arising under the Act may be classified under four heads, as follows:

First. Cases involving contracts, combinations, or conspiracies, by force, or by threats of damage to the property, business, or persons of others, to restrain trade or commerce of the public, or of others than those contracting, combining, or conspiring.

The Debs case[1] was of this class. Certain railway employés had entered into a combination or conspiracy to stop the operation of railways that were highways of interstate commerce. The stoppage or obstruction of the highways of interstate commerce necessarily operated as a direct restraint of the interstate commerce of the public generally.

Loewe *v.* Lawlor[2] also was a case of this class. Certain laborers had entered into a combination or conspiracy, by means of a trade boycott, to restrain interstate trade or commerce between certain manufacturers and their customers. While in this case there was no physical obstruction of commerce, the object of the combination was, by threatening damage to the business of other persons, to restrain them from engaging in interstate commerce until they had complied with the demands of the combination.

[1] *In re* Debs, 158 U. S. 564. See also *In re* Phelan, 63 Fed. 803; United States *v.* Debs, 64 Fed. 724.

[2] 208 U. S. 274.

Combinations and conspiracies, by means of physical force, or by means of a boycott or threats of damage, to prevent other persons or the public generally from engaging in interstate commerce never can be reasonable or just. All combinations and conspiracies of this class are illegal at common law, and it is eminently proper that, when in restraint of interstate trade or commerce, they should be prohibited by an Act of Congress as broad in its scope as the common law. Therefore, the absolute prohibition of the Anti-Trust Act should not be qualified or limited in its application to contracts, combinations and conspiracies of this class.

Second. Cases involving contracts or combinations among railway companies to increase or to prevent a reduction of the rates or charges to be paid by the public engaging in interstate trade or commerce upon the railways.

The railways are the principal highways of interstate trade and commerce, and it is the duty of each railway company to furnish transportation at reasonable rates over its railway. As was decided in the Debs case, any combination, by physical force, to restrain the transaction of commerce upon these public highways is in restraint of interstate commerce; and for similar reasons a combination among the owners of railways to render the transaction of interstate commerce upon the railways more difficult or more expensive is in restraint of the interstate commerce of the public.

The Trans-Missouri Freight Association case[1] and the Joint Traffic Association case[2] were of this class. In those cases it was held that contracts or combinations among railway companies to fix and maintain rates upon competitive interstate traffic operated as a restraint of interstate commerce, because the natural and direct effect of such contracts or combinations was to maintain rates at a higher level than otherwise would prevail. In these cases the combinations were held to be unlawful, not because they restrained interstate commerce of the railway companies, but because they operated as restraints upon the interstate commerce of the public. In this respect these cases were similar to those of the first class above referred to; but in the cases of the first class the restraint was an absolute one and was effected by force or duress, whereas in the cases now under consideration the restraint was only partial and resulted from the tendency of the

[1] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290.

[2] United States *v.* Joint Traffic Association, 171 U. S. 505, 565, 569.

contracts or combinations to increase or to prevent a reduction of the charges or tolls to be paid by the public.

In the Northern Securities case,[1] it was held that a combination to acquire and to hold a majority of the stocks of two railway companies owning parallel and competing lines that were highways of interstate commerce was in violation of the prohibitions of the Anti-Trust Act. If, as decided in the prior cases, a contract or combination to maintain rates and to suppress competition among railway companies as to interstate commerce was in restraint of the interstate commerce of the public and therefore illegal under the Act, the Supreme Court clearly was right in holding that the combination in the case of the Northern Securities Company was illegal. The direct effect of the combination in that case was to destroy the possibility of true competition between two companies owning parallel and competing lines and to maintain their rates at a higher level than otherwise would prevail.

It has been contended that the unqualified prohibition of the Anti-Trust Act as applied to such combinations of railway companies should be limited, (*a*) because the enforcement of this unqualified prohibition would prevent railway companies from consulting among themselves as to their rate schedules in respect of competitive traffic, and from making joint arrangements that are necessary to the proper management of the railways throughout the country; and (*b*) because combinations among railway companies to maintain fixed rates that are not unreasonably high, or to divide or pool competitive traffic, and combinations to establish common ownership or control of competitive lines, should be permitted as such combinations would result in better and more economical railway service and would not injuriously restrain interstate commerce, since the railway companies are prohibited by law from imposing unreasonable rates, and any attempt to impose unreasonable rates can be prevented by application to the Interstate Commerce Commission.

It may be replied to these contentions, (*a*) that the Anti-Trust Act has not been construed and is not likely to be construed as prohibiting consultations among railway officials to establish uniform rate schedules for competitive business, provided that the railway companies do not undertake to maintain these rate schedules, or as prohibiting contracts or combinations of the railway

[1] Northern Securities Co. *v.* United States, 193 U. S. 197.

companies that do not impair their independence or their right to compete freely as to interstate traffic; and (*b*) that neither the common law and statutory prohibitions against unreasonable rates of railway companies, nor the powers of the Interstate Commerce Commission under the existing laws, furnish effective means of regulating railway rates. The only effective means of regulating railway rates have been and still are competition by rail and by water, the necessities of trade and commerce, and the enlightened self-interest of the railway companies themselves.

In the opinion of the writer, an exemption from the operation of the Anti-Trust Act would be of little advantage to the railway companies. Agreements among railway companies to maintain fixed schedules of rates and agreements to divide or to pool competitive interstate traffic probably were illegal before the Anti-Trust Act was passed, and they certainly proved ineffective. The desirability of such agreements in the interest of the railway companies has been greatly diminished by the enforcement of the laws requiring rate schedules to be filed and prohibiting any departure from these schedules. Contracts and combinations, by means of purchases and consolidations or by means of stock control, to unite competitive railway lines under a common ownership or control are prohibited by the laws of many of the states, and a mere exemption from the operation of the Anti-Trust Act would not render them lawful.

It is improbable that Congress would pass a law enabling the railway companies to enter into such contracts and combinations even if Congress had power by such a law to override the prohibitions of the state laws; and it is equally improbable that Congress would repeal the prohibition of the Anti-Trust Act as to such contracts and combinations without at the same time conferring upon the Interstate Commerce Commission the power of its own motion to prescribe, and from time to time to change, complete schedules of rates in respect of all interstate traffic affected by such contracts and combinations. The far-reaching results of such an extension of the power of the Interstate Commerce Commission cannot be overestimated, and its disadvantages to the railway companies probably would far outweigh any advantages that would accrue to them through such contracts and combinations.

Third. Cases involving monopolies, or attempts to monopolize, or combinations or conspiracies to monopolize, any part of the

trade or commerce among the several states or with foreign nations.

In Addyston Pipe Co. *v.* United States[1] it appeared that all or nearly all of the manufacturers of iron pipe within thirty-six states and territories had combined under an agreement to apportion among the members of the combination the trade in iron pipe within the prescribed territory. The purpose of the combination was, by establishing a community of interest among the manufacturers, to destroy competition among them and to monopolize the trade in iron pipe within the territory covered by the agreement.

Montague *v.* Lowry[2] was another case of this class. Certain dealers in tiles in California and certain manufacturers of tiles in eastern states had formed an association under an agreement prohibiting the dealers from purchasing tiles from manufacturers who were not members of the association and prohibiting the manufacturers from selling tiles to any dealers in California who were not members. The object of the association was, by establishing a commercial boycott against other dealers, to secure to those dealers who were members of the association a monopoly of the business in tiles.

The Anti-Trust Act prohibits not only the monopolizing of any part of trade or commerce, but also every attempt to monopolize and every combination or conspiracy to monopolize, though no monopoly in fact be created. The illegality of an attempt to monopolize, or of a combination or conspiracy to monopolize, does not depend upon the success of the attempt, or upon the results accomplished by the combination or conspiracy.

But there can be no attempt to monopolize and no combination or conspiracy to monopolize unless there be an intent or purpose to effect a monopoly,[3] or unless the necessary result of the acts of the parties, if successful, would be to create a monopoly, in which case the intent or purpose to monopolize may be implied. It should be observed also that the Act does not prohibit the monopolizing of the manufacture or of the ownership of articles of trade or commerce, but it prohibits only the monopolizing of trade or commerce itself.[4]

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[1] 175 U. S. 211.

[2] 193 U. S. 38. See also Swift *v.* United States, 196 U. S. 375; Continental Wall Paper Co. *v.* Voight, 212 U. S. 227.

[3] See Swift *v.* United States, 196 U. S. 375, 396.

[4] In United States *v.* E. C. Knight Co., 156 U. S. 1, 17, it was held that although a combination of sugar refining companies created a monopoly of the manufacture of

A monopoly involves complete control of a branch of trade, or such control as substantially precludes competition. A combination that diminishes competition in a branch of trade does not create a monopoly if substantial competition remains. The second section of the Anti-Trust Act does not prohibit acts or combinations that merely restrain competition, or that in conjunction with other further restrictions of competition might result in a monopoly, unless such acts be steps in carrying out an attempt or purpose to effect a monopoly of a branch of trade or commerce. An act that diminishes competition is not unlawful unless it creates a monopoly, or unless it is a step in carrying out an attempt to effect a monopoly. A combination that diminishes competition is not unlawful unless the purpose or effect of the combination is to create a monopoly.

It follows, therefore, that if two or more manufacturers or merchants who are competitors in some branch of interstate commerce should form a partnership or other combination destroying competition among them, this would not be in violation of the second section of the Act, unless the purpose or the effect of the combination was to monopolize a branch of interstate trade or commerce.

Individual manufacturers or producers of articles of interstate trade or commerce often enter into agreements to sell their products to certain dealers and no others. Exclusive trade agreements of this kind never have been held to be unlawful as creating monopolies. Such agreements plainly are distinguishable from the combinations or conspiracies condemned in Montague *v.* Lowry and in the case of the Addyston Pipe Company.

Attempts to monopolize and combinations and conspiracies to monopolize any branch of trade or commerce are unlawful at common law, and it is proper that all such attempts, combinations and conspiracies to monopolize interstate commerce should be prohibited by Act of Congress.

No doubt it would be desirable to define what constitutes a

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refined sugar within the United States, it did not create a monopoly of trade or commerce in refined sugar or constitute a combination to monopolize trade or commerce. Chief Justice Fuller said: "It does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

monopoly or an attempt to monopolize a part of interstate trade or commerce; but it is very questionable whether a comprehensive and clear statutory definition could be framed. A statutory definition probably would give rise to as much uncertainty and litigation as the word "monopolize," and judicial decisions would be necessary to define the definition itself. The safer and better course is to let the courts, guided by common understanding of the word "monopolize" and by the principles of the common law, settle the meaning of the statute by determining its application to individual cases as they arise.

Fourth. Cases involving contracts or combinations that merely prevent or diminish competition among those contracting or combining, without restraining the trade or commerce of others and without constituting a monopoly, or an attempt to monopolize, prohibited by the second section of the Anti-Trust Act.

At common law such contracts and combinations were not unlawful, except that a contract of an individual not to exercise his craft or trade was held to be unreasonable and void unless the contract was for the purpose of carrying out some lawful transaction, such as a sale of the business or good-will of the contracting party.

The Anti-Trust Act does not purport to prohibit contracts or combinations that merely diminish competition, nor does it purport to prohibit contracts that merely restrict the liberty of an individual to exercise his craft or trade. The first section of the Act prohibits only contracts and combinations *in restraint of trade or commerce*, and the second section prohibits only contracts and combinations creating a monopoly or for the purpose of creating a monopoly.

The Anti-Trust Act was passed for the purpose of protecting the public against unlawful restraints of trade and commerce, and not to protect individuals from the consequences of their own acts or contracts. It is very doubtful whether Congress would have constitutional power to pass a law merely for the protection of the personal liberty of individuals by preventing them from entering into contracts or combinations limiting their power to engage in interstate commerce in competition with others. Such a law for the protection of the personal liberty of contracting parties could not fairly be considered a regulation of interstate commerce within the meaning of the Constitution.

The prohibition of the first section against restraints of trade or commerce cannot fairly be construed as prohibiting all contracts

that merely diminish competition among those contracting or combining. Such a construction would give to the phrase "in restraint of trade or commerce" a meaning never before attributed to it by lawyers or by the public generally and would render the second section of the Act purposeless. If *all* contracts and combinations diminishing competition were prohibited by the first section, contracts and combinations to monopolize were included in the prohibition, and there was no need of a second section to prohibit monopolies, attempts to monopolize, and combinations to monopolize.

Many contracts and combinations that simply restrict competition among those contracting or combining, without involving monopolies or attempts to monopolize, are necessary to the successful conduct of trade and commerce, and such contracts and combinations always have been considered reasonable and proper in the United States as well as in other countries. If the Anti-Trust Act should be construed as prohibiting contracts and combinations of that class, it would be impossible, without incurring civil and criminal liabilities, to carry on the trade and commerce of the United States.

For these reasons it is submitted that the first section of the Anti-Trust Act should not be construed as prohibiting contracts and combinations that simply prevent or diminish competition among those contracting or combining without restraining the trade or commerce of others, and that such contracts and combinations are unlawful only if they are in violation of the second section which prohibits monopolies, attempts to monopolize and combinations to monopolize any part of interstate trade or commerce.

While there are numerous dicta to the effect that all combinations in restraint of the freedom of competition are in violation of the Anti-Trust Act and unlawful, there appears to be no decision that the Act prohibits contracts and combinations that merely prevent or diminish competition among those contracting or combining, without restraining the freedom of trade or commerce of others and without constituting a monopoly, or an attempt to create a monopoly, of any branch of trade or commerce.[1]

In the opinion of the writer, it is not desirable to amend the Anti-Trust Act until the Supreme Court shall have decided

[1] See United States *v.* Joint Traffic Association, 171 U. S. 505, 567.

whether the prohibitions of the Act apply to contracts and combinations of that class. If the Supreme Court should decide that such contracts and combinations are prohibited, an amendment of the Act certainly would be needed. But if the Supreme Court should decide that contracts and combinations of that class are not prohibited by the Act, but are governed by the state laws, no amendment of the prohibitions embodied in the first three sections of the Act would be needed.

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